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No. 92-724

In The

# Supreme Court of the United States

OCTOBER TERM 1992

PHOENIX ENGINEERING, INC.; TENNESSEE ROOFING CORP.; DEL-AIR SERVICE CO., INC.; LLOYD J. BUNCH; J.C. BIBLE; EAST TENNESSEE CHAPTER ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE, INC., KNOXVILLE BRANCH,

*Petitioners,*

vs.

MK-FERGUSON OF OAK RIDGE CO.; KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; UNITED STATES OF AMERICA; JAMES D. WATKINS; JOSEPH LaGRONE,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners Phoenix Engineering, Inc., Tennessee Roofing Corporation, Del-Air Service Company, Lloyd J. Bunch, J. C. Bible, East Tennessee Chapter Associated Builders and Contractors, Inc. and Associated General Contractors of Tennessee, Inc., Knoxville Branch, hereby reply to Respondents' Briefs in Opposition to the petition for writ of certiorari.

1. At the outset, the Solicitor General has conceded that this case presents a direct conflict with the First Circuit's *Boston*

*Harbor* decision presently pending on writ of certiorari before the Court. Fed. Resp. at 6. The Solicitor recommends that the Court should hold the present petition in abeyance pending the outcome of the *Boston Harbor* appeal. *Id.* at 6-7. Petitioners agree that this is a logical approach. *See* Pet. at 18. [1]

2. Both Respondents have nevertheless attempted to distinguish the *Boston Harbor* case from the present one, on the grounds that the federal government in this case was not in a direct contractual relationship with any of the petitioning construction contractors. However, given the procedural posture of this case, this argument is simply incorrect. Both the district court and the court of appeals took as given the fact that DOE was involved in the negotiation of the Project Labor Agreement at issue and that MK-Ferguson was acting as DOE's agent when administering the Project Labor Agreement at the ORO facility. In this regard, the court below stated as follows:

> The district court assumed that the DOE was involved in the negotiation of the Project Labor Agreement. We adopt this assumption because the nature of the action under review compels us to do so. The district court disposed of the defendants' motions as if they were motions to dismiss. When we review a district court's grant of a motion to dismiss for failure to state a claim on which relief may be granted, all factual allegations are deemed admitted. Here, plaintiffs have alleged that the DOE directed the negotiation of the Project Labor Agreement.

Pet. App. 14-A.

The issue presented for review, therefore, is not whether the government in this case is responsible for the imposition of

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[1] Although the private party Respondents have not conceded the direct conflict, they too appear amenable to holding the present petition in abeyance pending the outcome of *Boston Harbor*. Resp. Brief at 7.

the union-only requirement on this government project. That fact is affirmatively assumed. Rather, the issue, as stated in the petition, is whether the federal government, when acting directly and through a project manager as its agent, is prohibited by federal labor law from interfering with the process of collective bargaining by requiring private construction employers to sign collective bargaining agreements with a union as a precondition of performing government work. As the court below recognized, this is "exactly the factual scenario" on a federal level, as the *Boston Harbor* case presents on a state level. *Id.* at 18-A. As such, the legal issues are indistinguishable and, as the Federal Respondents concede, a clear conflict exists between the courts of appeals on this point.

3. The Respondents have also suggested that *Boston Harbor* is inapposite because this case involves a challenge to the contracting practices of the federal government, not a state or local government. Such an assertion simply ignores this Court's holding in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), in which the *Machinists* doctrine was clearly extended to cover all direct governmental interference with collective bargaining, regardless of its source:

> In *Machinists*, we reiterated that Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. . . . "[T]he Congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct must be free of regulation. The *Machinists* rule creates a free zone from which all regulation "*whether federal or state*," . . . is excluded.
>
> . . . .
>
> The *Machinists* rule is not designed . . . to answer the question whether state or federal regulations should

> apply to certain conduct. Rather, it is more akin to a rule that denies *either sovereign* the authority to abridge a personal liberty. . . . [T]he interest in being free of government regulation of "the peaceful methods of putting economic pressure on one another" . . . is a right specifically conferred on employer and employees by the NLRA.

*Id.* at 110-112 (emphasis added). Thus, the Respondents' contention that the prohibitions of the NLRA do not apply to the actions of the federal government does not withstand scrutiny and affords no basis for denying the petition.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for writ of certiorari or hold it in abeyance pending the outcome of the *Boston Harbor* case.

Respectfully submitted,

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